



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

- V E R S U S -

CHARLES KUNGU GACHERU.....ACCUSED

J U D G M E N T

Charles Kungu Gacheru, the accused herein, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 25/2/2018 at Equator Village in Nyandarua North Sub-County, murdered **Gabriel Kimani Kiragu** (the deceased). The deceased was also generally known as '**Ngafu**'.

The accused denied the offence and the case proceeded to full trial.

The prosecution called a total of 10 witnesses in support of their case. The accused testified on oath but did not call any witness.

ML, a girl aged 12 years testified that on 25/2/2018, about 2.00 p.m. she was with her aunt BW who is aged 15 years, Brian Mwirigi and Stanley Ng'ang'a, tethering cattle near Gabriel Kimani's house when her uncle Charles Kungu Gacheru (the accused) entered the house of the deceased. They heard the deceased screaming and ran there to find out what was happening. They found the accused beating the deceased and saying that the deceased should not die with his money, Kshs.100/=.

PW1 said that the deceased lived alone and at that time, he was sick, coughing and spitting blood; that the accused then removed the deceased from the house and they fell at the door in the process and they kept falling as accused took the deceased to the garden. When in the garden, the accused continued to slap the deceased and hit him with his knees PW1 went to call his father Charles Kungu Mweru (PW3) and uncle. Reuben Gacheru; that when her father came, accused told them to take Gabriel back into the house. Another of her uncles, Charles Kungu Wanjiru arrived and entered Gabriel's house and found that he had died.

PW2, SN, a boy aged 12 years recalled that on 25/2/2018, about 5.00 p.m., he was at home with PW1, Ciku Wambui, Maxi and Reuben and Kungu father of PW1; that he was repairing a vehicle while Beth had gone to herd goats but came and informed them that Gabriel Kimani alias 'Ngafu', his grandfather, was coughing blood; that they went to see the deceased in his house, found him sitting on the bed; that the accused arrived and told the deceased that he would not die with his Kshs.100/=; that the accused started to slap the deceased on the forehead and back; that Charles Kungu then removed the deceased outside; that the accused tripped and dropped the deceased down, that PW1 called her father to come and he intervened; that PW1's father took the deceased back to the house.

PW2 saw accused beat the deceased (Ngafu) with his bare hands on the head, back. PW2 identified the accused as Baba Symo; that accused was drunk and walked as if going to fall; that accused also used his knees to hit the deceased on the head but he did not have any weapon.

PW3 Charles Kungu Mweru recalled that on 25/2/2018, he arrived home about 6.00 p.m. when Monica (PW1) informed him that Baba Symo or Charles Kungu Gacheru (accused) who is his cousin, was beating Gabriel Kimani; that the deceased had bought land from PW3's father, Charles Kungu Muiiru. He was able to see accused and the deceased in the garden from his home about 70 metres away as accused made the deceased fall. He went there and asked accused why he was beating the deceased; that accused stopped assaulting the deceased and he took him back to the house and placed him on the bed; that the deceased was bleeding from the mouth. All that time, PW3 was with his brother Reuben Mweru, Njuguna and children: Monica, Nganga, Wanjiku and others.

Later, PW3 heard that the deceased had died; PW3 said that the deceased never told him why he was being beaten. PW3 also knew the deceased as 'Ngafu'. Apart from bleeding from the mouth, PW3 did not see any injuries on the deceased; PW3 said that later, the Administration Police came with accused as accused had gone to report to them that the children and PW5 had framed him with the murder.

PW4 Peter Njuguna Mundia recalled that on 25/2/2018, he was taking cattle to the river when he found the accused beating the deceased

and they were behind the deceased's house; that the house was next to the road and there is no fence or trees to obstruct one; that accused was lifting the deceased and throwing him down; that PW3 and Reuben arrived; that accused was asking the deceased for his money KShs.100/=; that PW3 returned the deceased back to his house. He said that he later saw an injury on the deceased forehead and a swelling.

PW5 David Kimani Kamau testified that Gabriel Kimani, the deceased was his uncle. His father was a brother to the deceased; that on 25/2/2018 while at his house at about 5.00 p.m. Charles Kungu Wanjiru informed him that the deceased was calling him and had a bad chest. He found the deceased on the bed but he was dead. He reported at Equator Administration Police Post and was accompanied by police to the house where the deceased was confirmed dead. Police were called, came and took photographs and took away the body. He did not see any injuries on deceased's body but blood was oozing from the nose. He learned that accused beat deceased. On 27/2/2018, he identified the deceased's body to the Doctor who performed the postmortem and deceased was found with injuries to the forehead and 5 ribs were fractured; some blood was flowing from the nose and there was blood in the right ear; that the brain was mixed with blood.

APC Musa Aleu (PW6) of Equator Police Post recalled the 25/2/2018 when APC Yusuf informed him of a murder. They left for the murder scene but they met the accused Charles Kungu Gacheru who told them that people wanted to kill him because he was suspected of murder.

They took accused back to the camp where they found a group of people who took them to the deceased's house. They found the deceased on his bed and they called Karai Police Post. He observed the deceased's body and it had no visible injuries except some dust.

Dr. Karimi Joseph Kinyua (PW7) of Nyahururu County Hospital received a request from Ndaragua Police Station to conduct a postmortem on the body of Gabriel Kimani. On examination, he found bruises on the occipital left parietal region, a bruise on mid chest and more on the right. There were multiple fractures of the ribs, 2nd – 5th with haemothorax (blood in the chest), that the lungs were adherent to the plural, which was evidence of a pre-existing chronic infection; one of the layers of the scalp had haematoma – left; and subdural haematoma. He opined that the cause of death was severe head injury with subdural haematoma and multiple rib fractures. He denied that the cause of death was the pre-existing infection. He further said that the fractured ribs affected the lungs which in turn caused the haemothorax and that the probable weapon used was blunt.

PW8 PC Yusuf Sora Abagira, met Daniel Kimani at Wakungu trading Centre who informed him that his uncle had been assaulted and had died as a result. In company of another police officer, he found people outside the camp, who informed him that Gabriel Kimani had been killed.

They went to the scene, secured it and called Ip. Mwangi of Karai Police Post; that he had been informed that the suspect was Charles Kungu whom he knew as a neighbor.

PW9 PC Edward Esanya a Scenes of Crime Officer Nyandarua, together with the investigating officer IP Mwangi, went to Equator area to document a scene of crime whereby he found the body of the deceased and he took 6 photographs of the body. (P.Exh.No.2). He did not see any visible injury on the deceased.

PW10 CIP Stanley Mwangi the investigating officer in this matter recalled 25/2/2018 about 6.30 p.m. he received a report of murder on phone. He proceeded to the scene with other police officers. He found two Administrative Police Officers had rescued accused from the mob for allegedly murdering Gabriel Kimani also known as 'Ngafu'. He made enquiries of what had happened and arrested accused. He observed the deceased and noticed a bruise on his back. He received information from the witnesses that they saw accused beat the deceased and dragged him on the ground.

After close of the prosecution case, the court found that the prosecution had established a prima facie case against accused for him to defend himself. He opted to give a sworn statement in which he denied committing the offence.

He stated that on 25/2/2018, he was waiting for a customer who was supposed to get charcoal from him. After the customer came, accused asked his wife to let Simon Gacheru look after his cattle as she was going to church and he wanted to go somewhere. He left for Kungu town at 1.10 p.m. where he took some alcohol at the club.

He left for home about 5.00 p.m. using the route that passes by deceased's home; that he looked at Gabriel's home and saw the door open. He called Gabriel but he did not respond and decided to enter, found Gabriel seated near the fireplace. On enquiring why the deceased was quiet, the deceased said he was coughing blood. He sent for Charles Kungu Mweru who came to deceased's house with Reuben Gacheru his brother. He requested them that they take Gabriel to hospital but Charles Kungu said he could not but they could place him on his bed. He decided to go to the Administration Police camp but did not get the police and decided to seek help from Equator. A motor cycle came, he stopped it and there were 2 police officers whom he told what was going on. He took them to the deceased's house but found him already dead; that Charles Kungu and Reuben said he was the first at the scene and should explain; that as he explained, people threatened to kill him and he ran to the police for safety; that the police handcuffed him and people descended on him but police rescued him.

He denied ever beating the deceased or lifting and dropping him to the ground as alleged; that his father and mother of Charles are brothers and sister and had grudges between them over land which had been left to him by his grandfather which others alleged was bigger than theirs. He denied having given the deceased any money or that he demanded it from him as they were friends.

The charge that the accused faces is one of murder contrary to Section 203 of the Penal Code. To prove a charge of murder, the prosecution has to establish beyond reasonable doubt that the following ingredients exist:

(1) Proof of the fact and cause of the death of the deceased;

(2) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person;

(3) Proof that the said unlawful act or omission was committed with malice aforethought;

(4) Proof of identity of the accused.

The death of the deceased has been proved by the evidence of PW1, 2 and 3 because they saw the deceased lying on his bed dead PW5 identified the body to PW7 Dr. Kinyua who performed the postmortem on the deceased. PW7 confirmed the cause of the death and I find as a fact that the deceased died.

PW1, PW2, children aged 12 years, underwent a *voire dire* examination after which the court was satisfied that they were intelligent enough to understand the proceedings and meaning of oath. They testified that they did see the accused assault the deceased.

Both PW1 and PW2 said that the deceased was sick, coughing blood. PW1 who was herding cattle nearby said they saw accused enter deceased's house, then they heard the deceased screaming and went to find out only to find accused standing by deceased's bed and beating the deceased using his bare hands; that he removed the deceased from the house and fell at the door and they fell several times. PW1 saw accused beat the deceased by slapping him and hitting him with his knees.

PW2 corroborated PW1's evidence in all material particulars, that accused hit the deceased with slaps, the knees and that he kept lifting and dropping the deceased as he removed the deceased from the house taking him outside. Both PW1 and PW2 recalled that it is PW3, who intervened and took the deceased back to the house. PW3 who was called to the scene by PW1 also said from a distance, he saw accused lift up the deceased twice and hit him to the ground.

In addition, PW1, 2 and 3 stated that the accused was demanding KShs.100/= from the deceased saying that the deceased should not die with his money. PW4 a resident of the area further corroborated PW1, 2 and 3's evidence that when passing by deceased's home about 5.00 p.m. he saw accused raising the deceased and throwing him down and just then PW3 intervened. PW1, 2, 3 and 4 confirmed that there was no fence around the deceased's house and so PW4 was able to see what was happening in the deceased's home. This incident occurred at about 5.00 p.m. during the day. The accused was a person known to the witnesses, an uncle to PW1 and cousin to PW3. I am satisfied that the witnesses were credible and believable.

In his defence, the accused denied assaulting the deceased but claimed to have gone to assist in taking the deceased to hospital and asked PW3 and Reuben to assist only for them to allege that he had assaulted the deceased. I have weighed the said defence against the evidence of PW1, 2, 3 and 4 who were the eye witnesses. I find that the witnesses were truthful and had no reason to frame the accused. In fact, according to accused, when asked to explain the deceased's death, he said some people whom he did not disclose decided to attack him and that is why he ran to the police station for help.

The accused also attributes the charge to the bad blood that existed between him and his cousin PW3 over land that he had been given by the grandfather. PW3 categorically denied the existence of a land dispute between them. PW3 explained that the accused got more land because his mother is not there. No allegation of an existing grudge was ever made to the police, PW7, 9 and 10 at the time of accused's arrest. PW1, 2 and 3's evidence was corroborated by PW4, an independent witness who is neither related to the witnesses nor accused. I believe PW4 and find the witness to be truthful.

PW7 performed the postmortem on the deceased and found him to have injuries as follows: bruises to the occiput, bruise to mid chest and multiple fractures on the 2nd – 5th ribs with minimal haemothorax (blood in the chest). There were also bruises on the scalp (clot) but no fracture. Those injuries are consistent with the manner in which the accused allegedly assaulted the deceased, by lifting and throwing him to the ground. The injuries were internal and hence the reason why the witnesses did not see any visible injuries on the deceased. The Doctor found that the cause of death was severe head injury with subdural haematoma and multiple rib fractures.

Although PW7 found the deceased to have had a chronic infection of the lungs, he was of the view that that infection did not cause the death. This court is satisfied that the injuries inflicted on the deceased by the accused caused his death.

Whether the accused had malice aforethought:

Malice aforethought is defined under Section 206 of the Penal Code. It is proved when any of the following circumstances are established:

- (1) An intention to cause the death of or to do grievous harm to any person, whether killed or not;**
- (2) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not;**
- (3) An intention to commit a felony;**
- (4) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.**

Malice aforethought can be either direct or indirect or can be inferred from the manner in which the killing took place. It will depend on the circumstances of each case, e.g. the nature of the weapon used, the part of the body that is targeted, the manner in which the killing is done and the evidence by the accused before doing and after the attack, e.g. in *Abang'a alias Anyango v Republic Cr.A.32/1990*, the deceased was stabbed severally by a sharp object.

In the instant case, the evidence tendered by the witnesses is that the accused repeatedly slapped the deceased and hit him with his knees, then removed him from the house and kept lifting and throwing him to the ground. The deceased was a frail old man. The photographs

produced in evidence confirm that fact. The medical evidence adduced by the doctor was consistent with injuries inflicted on the deceased. The act of lifting and throwing the deceased on the ground was intentional and meant to do grievous harm to the deceased. The other injuries may have been inflicted when the two were still alone. The accused was demanding payment of his money and hence his actions were very intentional. Though PW1 mentioned that accused looked drunk, the accused did not raise the defence of intoxication or drunkenness.

The accused was therefore in his right mind when he went to demand for his money. From my assessment of the circumstances, there is no evidence that the accused set out to cause grievous harm to the deceased or kill him.

It seems all he wanted was to be paid Kshs.100/= though Kshs.100 was not worth the extent he went to. In the end, I find that though the accused caused the deceased's death, malice aforethought has not been established and I will find the accused of the lesser charge of manslaughter contrary to section 202 as read with Section 205 of the Penal Code and convict him accordingly.

Dated, Signed and Delivered at Nyahururu This 31st Day Of October, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for the State

Ms. Wanjiru Muriithi holding brief for Mr. Sigilai for accused

Accused – present

Shihundu – Court assistant